IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10464 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHANJIBHAI B. VANKAR

Versus

ADMINISTRATIVE OFFICER

Appearance:

1. Special Civil Application No. 10464 of 2004

MR KB PUJARA for Petitioner No. 1

MR BS PATEL for Respondent No. 1

MRS RANJAN B PATEL for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2,4-5

MR SP HASURKAR, AGP, for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 04/03/2005

ORAL JUDGEMENT

On 25.8.04 rule was issued in this matter and notice as to interim relief was also issued. At the joint request of the learned advocates appearing for the parties, the petition is taken up for final disposal today.

2. In the present petition, the petitioner has challenged the order dated 5.4.04 by which the petitioner is granted the benefit of second higher pay-scale on completion of 20 years of service with effect from 5.12.03 instead of 5.12.01.

3. Facts leading to the present petition are that the petitioner who is working as a Primary Teacher with respondent Municipal School Board of Ankleshwar Municipality since 5.12.81 was dismissed from service on 31.12.96. The petitioner challenged the said decision before this Court by filing Special Civil Application No.4291 of 1997. This Court relegated the petitioner to the remedy before the Tribunal. Before the Tribunal since there was disagreement between the two members of the Tribunal, the matter as per the provisions of the Bombay Primary Education Act referred to the Director of Primary Education. By the order dated 19.3.01, the Director of Primary Education held that the order of dismissal is bad in law and set aside the same. Respondent No.1 challenged the said decision before this Court by filing Special Civil Application No.2216/01.

4. On account of long pendency of the dispute, it appears that the parties agreed to appear before the Lok Adalat to explore the possibility of settlement. The matter was, therefore, placed before the Lok Adalat and the parties to the said petition which also included the District Education Officer entered into a compromise before the Lok Adalat on 19.9.02.

Some of the salient features of the said compromise entered into between the petitioner and respondent No.1 which was also countersigned by the DEO were that respondent No.1 would reinstate the petitioner in service with effect from 1.10.02. The petitioner agreed to forego the past wages except for a period of three years. Respondent No.1 agreed to pay wages for the past three years upon receiving the grant for the same from the Government. It was agreed between the parties that the entire period from 2.4.96 i.e. when the petitioner was placed under suspension till 1.10.02 i.e the date on which he was to be reinstated in service will count as continuous service of the petitioner and he would be entitled to receive pension, gratuity and other

retiral benefits on that basis. For the period between 31.12.96 to 1.10.02, the question whether the petitioner should receive increments or not was left open for the Competent Authority to decide. On the basis of the above terms and conditions, the disputes were settled between the parties and compromise was entered and made a decree of the Court.

5. It is the case of the petitioner that pursuant to the said settlement, the Competent Authority in fact decided to release the increments of the petitioner for the period in question by the order dated 5.10.02. The said order was, however, conditional on the Audit Department not raising any objection to the grant of the increments to the petitioner.

6. Subsequently, however, a communication came to be received by the petitioner dated 16.2.04 by which the Administrative Officer conveyed to the petitioner that except for the period of three years (during which the petitioner was not in active service) for the rest of the periods, increments are not to be released. The petitioner made a representation against the said communication on 19.2.04 and submitted that the entire period is to be treated as continuous and that therefore there is no justification for withholding the increments.

7. The Competent Authority, however, by the impugned order dated 5.4.04 was pleased to grant the benefit of second higher pay scale in favour of the petitioner on completion of 20 years of service with effect from 5.12.03. It is the case of the petitioner that he had completed 20 years of service on 5.12.01 and therefore the fixation of higher pay-scale ought to have been granted from the said date.

8. Learned advocate for the petitioner Shri Pujara submits that the respondents could not have denied the higher pay fixation in favour of the petitioner from the due date and there was nothing in the compromise which would permit the respondent to delay the higher pay-fixation as is sought to be done. He argued that the petitioner had foregone only wages for the period except 3 years and the entire period was to be treated as continuous for all purposes including for post retiral benefits. He submits that backwages to the extent of three years were also actually paid to the petitioner. It is contended that GR dated 16.8.94 issued by the Government does not envisage delaying of pay fixation in the higher cadre under the present circumstances.

9. On the other hand, learned AGP Shri Hasurkar, on the basis of the affidavit in reply filed by the Government submits that the period during which the petitioner was not in active service cannot be counted for granting him higher pay-scale especially when the petitioner is not paid salary for the said period on his own volition. He submits that increments were also withheld for the said period and therefore, the petitioner cannot get the benefit of higher pay-scale counting the said period for the purpose of fixing higher pay-scale. He relies on clauses 3(9) and 3(14) of the said GR dated 16th August 1994.

10. Learned counsel Shri B.S.Patel appearing for respondent No.1 adopts the stand of the Government. He, however, submits that in view of the apology tendered by the petitioner, respondent No.1 would not proceed further with the proposed departmental action against the petitioner for having made direct representation.

11. Having considered the rival submissions, what is required to be decided is the exact import and effect of the compromise arrived at between the parties entered into before the Lok Adalat on 19.9.02. As noted earlier, it is clear that it was agreed between the parties that for the period between 2.4.96 to 1.10.02, the petitioner would receive salary for the period of three years and he had foregone the salary for the rest of the period. The entire period, however was agreed to be treated as continuous service and the petitioner was held entitled to receive pension, gratuity and other retiral benefits on this basis. The question of increments of the petitioner between 31.12.96 to 1.10.02 was left open to be decided by the Competent Authority.

12. Thus the parties to the said compromise agreed that the entire period between 2.4.96 to 1.10.02 would be counted as continuous service for the petitioner. The DEO was also party to the said compromise. The question, therefore, is whether having agreed to treat the entire period as continuous service, the fixation of the petitioner in the higher pay-scale can be deferred on any ground. Neither clause 3(9) nor clause 3(14) of the said GR dated 16.8.94 issued by the Government would cover such a situation. Clause 3(9) provides that the performance of the teacher should on the whole be such as to warrant promotion and should be qualified for promotion. It further states that last 5 years of CR will be examined for deciding the suitability of the employee. In the second portion of the said clause, upon which the learned AGP seeks to place reliance, it is

provided that in cases where the teacher is under suspension or facing departmental proceedings, he will not be entitled to receive higher pay-scale and upon being exonerated and reinstated in service that higher pay-scale will be granted to him. It also provides that if increments are withheld with future effect, in such a case, only after completion of the period of nine increments, pay fixation can be granted. As stated earlier, the said clause does not govern the present situation where increments are not withheld by way of penalty or otherwise.

Equally, para 3(14) of the said GR also does not govern the situation wherein it is stated that leave without pay is not counted for the purpose of increments and that therefore the said period shall not be counted for the purpose of granting higher pay scale. In the present case, no order has been passed treating any period as leave without pay.

13. It is not uncommon that in certain cases an employee is held not entitled to receive salary, but he is held entitled to continuity in service for all purposes. When the parties agreed that the entire period shall be treated as continuous service, it was not open for the respondent to delay his higher pay fixation by ignoring the said period since such an action would amount to completely ignoring the two years period from the service of the petitioner which according to me is neither the intention nor the correct reading of the compromise entered into between the parties. Thus, I find that the authorities erred in passing the impugned order dated 5.4.04 by giving the benefit of higher pay fixation with effect 5.12.03 and the correct date ought to have been 5.12.01. Accordingly, it is directed that the respondents shall correct the pay fixation of the petitioner by granting higher pay-scale upon completion of 20 years service from 5.12.01.

14. In the result, the petition is allowed as aforesaid. Rule is made absolute accordingly with no order as to costs.

Direct service.

(Akil Kureshi, J.)
(vjn)